85-2101 (1)

Supreme Court, U.S.
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CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOSE SERRA, PETITIONER

v.

PAUL A. PICARDO, AND ROBERT ELSEA, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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JOSE SERRA, PETITIONER

v.

PAUL A. PICARDO, AND ROBERT ELSEA, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jose Serra petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

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[1]The parties in the courts below included the United States of America. In the Court of Appeals, however, both the direct appeal of the United States of America and the cross appeal of the petitioner against the United States of America were voluntarily dismissed, and the caption contains the names of all remaining parties to the case.

QUESTION PRESENTED FOR REVIEW

Does a judgment for compensatory damages against the United States for the denial of medical care needed by a federal prisoner, in an action brought under the Federal Tort Claims Act, bar a simultaneous award of punitive damages in a *Bivens*-type claim, against individual government employees whose violations of the prisoner's Eighth Amendment protection from cruel and unusual punishment were substantial causes of the prisoner's injuries?

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CONSTITUTIONAL PROVISION:

U.S. Constitution, Amendment VIII 1

STATUTES:

28 U.S.C. § 1346(b) 1

28 U.S.C. § 2676 2

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pages 1a-9a) is reported at 786 F.2d 237. A memorandum opinion and order was entered by the trial court at the conclusion of the case. That opinion is not published but is reprinted in the appendix hereto (Appendix, *infra*, pages 12a-22a).

JURISDICTION OF THIS COURT

The judgment of the court of appeals (Appendix, *infra*, page 10b) is not dated but was entered on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

2. 28 U.S.C. 1346(b) provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any

employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

3. 28 U.S.C. § 2676 provides:

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave use to the claim.

STATEMENT OF THE CASE

Jose Serra has a long history of peripheral vascular disease. In 1975, he lost his left leg to the disease, and since that time arterial blood flow to his left stump and right extremity has been maintained through a dacron inverted "Y" aorto-femoral bypass graft. On the morning of June 2, 1983, while Serra was a prisoner in the Federal Correctional Institution at Lexington, Kentucky, that graft occluded, effectively interrupting arterial blood flow to both of his extremities below the point of occlusion. Despite a series of telephone calls to the institution, from Serra's attorneys, physician and family members, institution authorities left Serra in the prison infirmary, with his right leg *elevated* for a period of approximately thirty hours before transferring him to the University of Kentucky Medical Center

for surgical intervention. Although a surgical catheterization of the graft, done on June 3, 1983, at the medical center was successful in restoring arterial blood flow to the right leg, by that time the muscle compartment of the lower right leg was irreversibly ischemic, requiring amputation of the right leg just below the knee. No attempt was made at the medical center to restore arterial blood flow to Serra's left stump.

Serra brought this action in the United States District Court for the Eastern District of Kentucky asserting a claim against the United States, under the Federal Tort Claims Act, and demanding compensatory damages for the injuries which he sustained by reason of the failure of officers and employees to provide him with timely medical treatment. He also asserted a separate *Bivens*-type claim for punitive damages only against Paul A. Pichardo, a prison doctor, and Robert Elsea, the warden, contending that their failure to timely respond to his serious medical needs was the result of their deliberate indifference to those needs. Federal jurisdiction was asserted pursuant to 28 U.S.C. § 1346(b) and 28 U.S.C. § 1331. (Appendix, *infra,* pages 23a-33a.)

The United States stipulated in the district court that it was liable to Serra because of the failure of its employees to provide timely treatment, and reversed for trial only the question of the dollar amount which would adequately compensate Serra for his injuries. (Appendix, *infra,* pages 34a-35a.)

At the trial of the action, the district court directed a verdict in favor of Elsea and submitted the remaining factual issues to a jury which sat in an advisory capacity as to the FTCA claim and as the trier of facts as to the claim against Pichardo. That jury returned an advisory verdict in favor of Serra in the amount of $625,000 in compensatory damages for his FCTA claim and a binding verdict in the amount of $15,000 in punitive damages for Serra's *Bivens*-type claim against Pichardo. Judgment was entered accordingly, and the United States and Pichardo appealed to the United States Court of Appeals for the Sixth Circuit. Serra cross appealed as to amount of the award against the United States and as to the granting of a directed verdict in favor of Elsea.

Ultimately, the United States and Serra each dismissed their respective appellate claims against the other, leaving for appellate resolution only the defenses asserted by Pichardo and Serra's claim that the district court improperly directed a verdict in favor of Elsea.

The United States Court of Appeals for the Sixth Circuit accepted the argument of Pichardo and Elsea that Serra's judgment for compensatory damages against the United States under the FTCA absolutely bars his claim for punitive damages against them as individuals for any violations of his constitutional rights. On that basis, the court below affirmed the directed verdict in favor of Elsea and reversed the judgment against Pichardo, without considering any

of the other appellate issues. (Appendix, *infra*, page 9a).

ARGUMENT

This case presents an important question concerning the application of the principles announced in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971) and *Carlson* v. *Green*, 446 U.S. 14 (1980). The court of appeals has held that an injured party who pursues and obtains compensatory relief under the Federal Tort Claims Act ("FTCA") is barred from simultaneously pursuing relief in the form of punitive damages against individual officials whose deliberate violation of the injured party's constitutional rights were causal factors in his injury. The decision below ignores the teachings of *Carlson* v. *Green*, found at 446 U.S. 20 that

> [V]ictims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights.

In effect, the Department of Justice has achieved for its employees, in the court of appeals below, substantially the same result which this Court refused to sanction in *Carlson* v. *Green*. In that case, the Solicitor General, acting on behalf of individual employees of the Department of Justice who occupied roles very

similar to those of Pichardo and Elsea in this case, sought and was granted a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit which held that the existence of a limited FTCA remedy does not preclude the existence of a *Bivens*-type right of action for injuries resulting from Eighth Amendment violations. Upon substantive consideration, however, this Court rejected the arguments of the prison officials, and held that the differences in the nature of the respective remedies, coupled with the different purposes which they serve and a reasonably apparent congressional intention that the remedies should co-exist, precludes relegation of the victime exclusively to the FTCA remedy. 446 U.S. 20-23. In *Carlson v. Green,* the applicability and effect, if any, of 28 U.S.C. § 2676 were not addressed.

By interpreting 28 U.S.C. § 2676 to require a plaintiff to elect between a *Bivens* action or an FTCA suit the court of appeals ignored an essential premise of *Carlson* v. *Green,* that the FTCA remedy alone is inadequate, and adopted a view of § 2676 that is both unreasonably restrictive and in conflict with the decisions of other courts. As recognized in cases such as *Moon* v. *Price,* 213 F.2d 794 (5th Cir. 1954) and *Henderson* v. *Bluemink,* 511 F.2d 399, 404 (D.C. Cir. 1974), the purpose of 28 U.S.C. § 2676 is to insure that a plaintiff receive only one complete satisfaction for a single injury. Stated differently, § 2676 assures only that, to the extent that the United States has ulti-

mately assumed and satisfied the individual tort liability of an employee, the employee will be relieved of that liability.

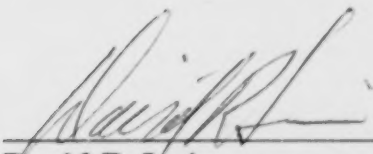
In the instant case, Serra sought only one complete recovery, *i.e.* actual damages from the United States for the loss of his leg and punitive damages from Pichardo and Elsea for their deliberate indifference to his serious medical needs. He has been left, however, with exactly that which *Carlson* v. *Green* held to be inadequate, and the individuals whose deliberate conduct contributed to his injuries have been shielded from answering in punitive damages for their infringement of Serra's constitutional rights.

The provisions of 28 U.S.C. § 2676 and the teachings of *Carlson* v. *Green* are drawn into apparent conflict by the holding of the court of appeals. Moreover, that holding has the unseemly effect of requiring a litigant to forego redress for a violation of a constitutionally protected right as a condition of pursuing a parallel and complementary statutory remedy. The bar statute and the teachings of *Carlson* v. *Green* can and should be harmonized, however, so as to achieve a result which does violence to neither and which is consistent with the interpretations given to the statute by the Fifth and District of Columbia Circuits as cited above.

CONCLUSION

The Court should grant this petition and ultimately consider whether or not, in light of its previous decision in *Carlson* v. *Green,* the provisions of 28 U.S.C. § 2676 should be applied so as to preclude an injured plaintiff from simultaneously recovering compensatory damages from the United States pursuant to an FTCA claim and punitive damages from individual government employees to a *Bivens* claim.

Respectfully submitted,



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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 84-6103 & 84-6122

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSE SERRA,
Plaintiff-Appellee, Cross-Appellant,

v.

PAUL A. PICHARDO,
Defendant-Appellant, Cross-Appellee,

ROBERT ELSEA,
Defendant-Cross-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed March 24, 1986

Before: KENNEDY and CONTIE, Circuit Judges; and GIBSON,* District Judge.

KENNEDY, Circuit Judge. Plaintiff, formerly a federal prisoner, sued the United States and two individuals—a prison doctor and the warden—alleging negligence and deliberate indifference to plaintiff's medical needs. Plaintiff

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*Honorable Benjamin F. Gibson, United States District Judge for the Western District of Michigan, sitting by designation.

obtained a judgment for compensatory damages from the United States (for negligence) and for punitive damages from the doctor, Paul Pichardo (for deliberate indifference). The District Court directed a verdict in favor of the warden, Robert Elsea. Dr. Pichardo appeals the judgment against him on the ground, among others, that the judgment entered against the United States on plaintiff's Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, claim bars plaintiff's *Bivens* action, *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), against himself (or the warden).[1] Plaintiff cross-appeals the court's decision to direct a verdict in favor of the warden and also cross-appeals the court's refusal to admit evidence of prior acts to show that the warden knew he could not trust the judgment of Dr. Pichardo. We agree with Dr. Pichardo that under the FTCA, plaintiff's judgment against the United States on the negligence claim bars his *Bivens* actions against the individual defendants. Thus it is unnecessary to address the other issues.

Plaintiff was incarcerated at the Federal Correctional Institution in Lexington, Kentucky. He has suffered from atherosclerosis, a form of progressive cardiovascular disease, since 1971. He underwent an aortal-femoral bypass graft in Houston, Texas, in 1975, but still had to have the left leg amputated above the knee later that year. After the graft, plaintiff faced the possibility of an obstruction of the graft that would reduce circulation to the right leg and the left stump.

On the morning of June 2, 1983, plaintiff noticed a decrease in his femoral pulse, and, knowing it was a sign of an obstructed bypass graft, reported to the FCI clinic for treatment. The examining physician's assistant diagnosed a possible arterial occlusion and referred plaintiff to Dr. Pichardo. Plaintiff alleged that Dr. Pichardo's handling of

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[1]Dr. Pichardo also asserts that there is insufficient evidence to support a verdict of deliberate indifference and that his conduct falls within the scope of activity protected by qualified immunity.

the condition that day and into the next morning constituted deliberate medical indifference, in violation of the eighth amendment, and caused an otherwise unnecessary amputation of plaintiff's right leg. Plaintiff also complained that the warden was deliberately indifferent to his medical needs. Finally, plaintiff sought compensatory damages from the United States under the FTCA for the negligence of the doctor and the warden.

At trial, the United States stipulated to the negligence of its officers and employees, thus admitting liability under the FTCA and limiting the dispute on that claim to the amount of damages. The jury that was impaneled to try the *Bivens* claim against the two individuals also served as an advisory jury on the FTCA claim. The jury returned a verdict of $15,000 in punitive damages against Dr. Pichardo and an advisory verdict of $625,000 as compensatory damages against the United States. The judge adopted the advisory verdict. The United States' appeal and a cross-appeal by plaintiff of the FTCA verdict have been voluntarily dismissed.

We turn then to the question of whether a plaintiff's actions against individual defendants on *Bivens* claims are barred after he obtains a judgment against the government on a FTCA claim, when each claim arises out of the same acts and events. The relevant statutory provision is 28 U.S.C. § 2676.

> **§ 2676. Judgment as bar**
>
> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Defendants argue that, because plaintiff has obtained a judgment against the United States (under section 1346(b)), he is completely barred from pursuing any action against defen-

dants for claims based on the acts or omissions that gave rise to the successful claim against the government. Plaintiff argues that section 2676 only bars him from bringing an action against defendants on the *same* claim that he successfully asserted against the government. Thus, since the claim against the government (negligence of the government's employees) is different from the claim against the individual defendants (constitutional violations committed by the employees), section 2676 does not apply.

The first step in determining the meaning of a statute is to look at the language Congress used. Although Congress could have stated more clearly the intended application of section 2676 to a situation such as this one, its choice of broad language indicates that it desired to do more than merely bar a plaintiff from bringing a subsequent identical action on the same claim. The section states that a judgment against the United States shall constitute a "complete" bar to "any" action by the claimant against the employee whose act or omission gave rise to the claim.[2] The only limitation on the scope of this bar is that the actions arise "by reason of the same subject matter." Thus, our decision in this case depends on whether "by reason of the same subject matter" means (a) "on the same claim" or (b) "arising out of the same actions, transactions, or occurences."

Perhaps the best guide to the meaning of "by reason of the same subject matter" is the language found in another section of the FTCA, 28 U.S.C. § 2672, dealing with the consequences of accepting a settlement from the government. It reads:

> The acceptance by the claimant of any such award, compromise, or settlement shall be final and

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[2]Although it is not clear whether "the claim" refers to the original claim or the one being asserted in the second action (*i.e.*, the one potentially barred), the reach of the section does not appear to be affected by that ambiguity.

> conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Because this section mandates that the acceptance of a settlement shall constitute a complete release of "any" claim against the employee (or the United States) by reason of the same subject matter, it is clear that the words "by reason of the same subject matter" were not intended to limit the scope of the release to the very claim that was settled. If that were Congress' intent, it surely would not have used the words "any claim."[3] We conclude that Congress intended that the phrase "by reason of the same subject matter" be given the same interpretation in section 2676.

At least one district court agrees that "the same subject matter" is not limited to "the same claim or cause of action." In *Armstrong v. Vogel*, 424 F. Supp. 445 (D.S.C. 1977), plaintiff sued a United States Navy physician for injury resulting from an emergency operation performed by the doctor. Plaintiff had previously instituted a suit against the United States,

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[3]The legislative history of the FTCA provides virtually no guidance on this issue. Defendants invoke certain purposes of the Act, such as protecting government employees from the burden of litigation and personal liability. But the Act does not prevent a plaintiff from suing a government employee, so long as no judgment has been entered against the United States in a FTCA suit. (The only exception involves suits for injury or damage resulting from a government employee's operation of a motor vehicle. *See* 28 U.S.C. § 2679.) Even the language quoted by defendants from the Committee Reports reveals the incomplete nature of the Act's protection of employees from liability.

> It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone, *within limits*, leaving the employee at fault to be dealt with under the usual disciplinary controls.

S. Rep. No. 1196, 77th Cong. 2d Sess. 5 (1942) (referring to the effect of settlements) (emphasis added).

under the FTCA, seeking damages due to the alleged negligence of certain agents and employees of the United States (including the doctor) in performing the emergency operation. As a result of pre-trial negotiations, a Stipulation for Settlement was executed, resulting in a consent Order for Judgment being entered by the district court. In the action against the doctor, the doctor moved to dismiss based on section 2676. Plaintiff responded that the action was based, not on the negligence of the doctor, but rather on an alleged assault and battery, premised on allegations that the doctor had procured plaintiff's uninformed consent by making misrepresentations. Plaintiff noted that such a claim could not have been brought as part of the FTCA action.[4]

The court in *Armstrong* held that the action against the doctor arose "by reason of the same subject matter" as the action plaintiff originally brought under the FTCA. It noted that the damages alleged arose from the same operation and thus originated from the same subject matter as the previous action. The court emphasized that its duty was to look to "the substance of the claim" rather than the language with which it is set forth. *Id.* at 447.[5]

The same court also addressed this issue in *Andrews v. Gee*, 599 F. Supp. 251 (D.S.C. 1984). In *Andrews*, plaintiffs, husband and wife, sued a Navy physician's assistant for damages arising out of acts of sexual intimacy allegedly committed by the defendant with the wife. The husband sought damages

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[4]Awarding punitive damages against the United States pursuant to a FTCA claim is precluded by 28 U.S.C. § 2674. Further, 28 U.S.C. § 2680(h) generally precludes the waiver of sovereign immunity for intentional torts of governmental officials, except for intentional torts committed by federal law enforcement officers.

[5]The court did note that the damages sought were identical in both cases. *Armstrong* is not distinguishable on this point, though, because, as was true in this case, plaintiff in *Armstrong* would have been entitled to punitive damages had she made out her assault and battery claim. *See e.g., Crim v. Shirer*, 278 S.C. 639, 300 S.E.2d 731 (1983).

for alienation of affection, loss of consortium and intentional infliction of emotional distress. The wife claimed that she was injured by negligent, careless and wanton and reckless treatment, and also sought damages for intentional infliction of emotional distress and false imprisonment. In a previous FTCA action against the United States, the court found that the assistant had engaged in sexual relations with the wife while she was under his care and that, as a result, she suffered chronic depression and confusion about her self-worth. The court also found irrevocable damage to the marriage. Judgment was entered in the amount of $100,000. *Andrews v. United States*, 548 F. Supp. 603 (D.S.C. 1982). The Court of Appeals for the Fourth Circuit affirmed, 732 F.2d 366 (4th Cir. 1984), noting that it did not matter that the assistant was not promoting his employer's interest at the time of his wrongdoing; the gravamen of plaintiffs' complaint was negligent supervision by one of the Navy doctors.

The court in the private suit against the assistant dismissed the complaints, relying on *Armstrong*. It noted that the damages sought by plaintiffs arose from the same actions towards the wife as those that defined the FTCA case and judgment.[6] Both causes of action centered upon the same unfortunate result—the disruption of the marital relationship. *Andrews*, 599 F. Supp. at 253.[7]

In the instant case, an examination of the substance of the *Bivens* claims reveals that they arise from the same actions toward plaintiff by defendants as those that defined the FTCA case. The *Bivens* claims and the FTCA claim focus on the

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[6]As was the case in *Armstrong*, the court was uninfluenced by the fact that punitive damages would have been available in the private suit, *see e.g., Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (intentional infliction of emotional distress).

[7]The court also held that it did not matter that the assistant was acting outside the scope of his employment, because state law precluded plaintiffs from having more than one satisfaction for the same wrong. *Andrews*, 599 F. Supp. at 254.

acts and omissions of the doctor and the warden with respect to the treatment of plaintiff on June 2 and 3, 1983. The only difference between the claims is that the *Bivens* claims involve an examination of the intent of the defendants. Furthermore, each of the claims centers upon the same injury to plaintiff's leg.

Plaintiff argues that the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), supports his interpretation of section 2676. In *Carlson*, the Court held that a *Bivens* remedy is available to a plaintiff even though plaintiff's allegations also could have supported a suit against the United States under the FTCA. But the instant case, unlike *Carlson*, deals with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy. As noted above, the scope of that power is defined and limited by a section of the FTCA that the Court in *Carlson* had no occasion to address.[8]

Finally, it is inconsequential that the claims were tried together in the same suit and that the judgments were entered simultaneously. *See Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir.) ("a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [the government employees]"), *cert. denied*, 439 U.S. 821 (1978); *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("the moment judgment was entered against the Government, then by virtue of § 2676 . . . the employee was no longer primarily answerable to the claimant,—he was no longer answerable at all") (footnote omitted), *aff'd*, 347 U.S. 507 (1954); *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The

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[8]Furthermore, to the extent that the Court based its decision on the FTCA and its legislative history, it limited its focus to a newly enacted section dealing with the availability of suits against the United States for intentional torts committed by federal law enforcement officers. 28 U.S.C. § 2680(h). *Carlson*, 446 U.S. at 20.

District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of the Act [section 2676] order judgment against [the government employee] in favor of [plaintiff] in the same action.").

Accordingly, we hold that plaintiff's judgment against the United States bars his actions against the individual defendants. The directed verdict in favor of Elsea is affirmed. The judgment against Dr. Pichardo is reversed. The action is remanded to the District Court with directions to enter judgment in favor of Dr. Pichardo.

FILED
MAR 24 1986
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
For the Sixth Circuit
No. 84-6103/6122

JOSE SERRA, Plaintiff-Appellee, Cross Appellant,

v.

PAUL A. PICHARDO, Defendant-Appellant Cross Appellee,

ROBERT ELSEA, Defendant-Cross Appellee.

JUDGMENT

Before: KENNEDY and CONTIE, Circuit Judges; and GIBSON, District Judge.

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, reversed in part, and the case is remanded consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: 4/15/86
COSTS: $91.00
Filing fee . . . . . $
Printing . . . . . $

A True Copy.
Attest:
/s/ Michelle N. Marr
Deputy Clerk

* * * * * * *

Eastern District of Kentucky
FILED
DEC 13 1984
At Catlettsburg
Leslie G. Whitmer
Clerk, U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 84-28

JOSE SERRA, PLAINTIFF,

VS. **MEMORANDUM OPINION AND ORDER**

UNITED STATES OF AMERICA, ET AL., DEFENDANTS.

This is an action for medical malpractice brought against the United States under the Federal Tort Claims Act, 28 U.S.C. §2671 et seq., for injuries suffered while the plaintif was incarcerated at the Federal Correctional Institution in Lexington, Kentucky. The United States stipulated negligence and the only issue submitted to the Court is one of compensatory damages under the Act.

Plaintiff's complaint further alleged claims for punitive damages against Warden Robert Elsea and Dr. Paul Pichardo. *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 US 388 (1970). The jury that was impaneld to try the *Bivens* claims was also used by the

Court as an *advisory* jury on the FTCA damage claims. Fed.R.Civ.P. 39(c). At the close of the evidence the motion of Warden Elsea for directed verdict was sustained. The jury returned an *advisory* verdict of $625,000 for the plaintiff against the United States on the FTCA claims and a dispositive verdict for $15,000 as punitive damages against Dr. Pichardo.

The jury further *advised* the Court with a verdict upon the FTCA claims as follows:

> We, the Jury, find for Jose Serra against the United States of America, and award him the following compensatory damages:
>
> | | |
> |---|---|
> | (a) Medical Expenses, not to exceed however the sum of $500,000 | $120,000 |
> | (b) Attendant care expenses, not to exceed however the sum of $500,000 | $ 5,000 |
> | (c) Permanent impairment of ability to earn money, not to exceed however the sum of $2,000,000 | $400,000 |
> | (d) Mental anguish and suffering not to exceed however the sum of $10,000,000 | $ 10,000 |
> | (e) Physical pain and suffering not to exceed the sum of $7,000,000 | $ 90,000 |
>
> TOTAL $625,000.00
>
> This 9th day of November, 1984.
>
> /s/ Bobbie Spaulding
> Foreperson

I. BACKGROUND

The plaintiff, Jose Serra, was born in Cuba in 1931 and immigrated to the United States in August of 1959. He was employed by a plastics company, and regularly traveled Central and South America selling plastic pellets used in the manufacture of phonograph records. After his conviction, for unspecified Federal charges, the plaintiff was incarcerated at the Federal Correctional Institution in Lexington, Kentucky.

He now resides in Miami, Florida with his wife and four children.

The plaintiff has suffered from atherosclerosis, a form of progressive cardiovascular disease, since 1971. An aortal-illiac graft performed in Miami to maintain circulation in the legs was unsuccessful, and in 1975 the plaintiff consulted Dr. Michael DeBakey's surgical group in Houston, Texas. An aortal-femoral bypass graft was done in Houston but, unfortunately, the procedure was not a complete success for plaintiff's left leg was amputated above the knee later on that year. This condition required constant monitoring because of the possibility of the development of an obstruction of the graft that would reduce the circulation of blood to the right leg as well as to the left stump.

On the morning of June 2, 1983, while a prisoner at FCI in Lexington, Kentucky, the plaintiff noticed a decrease in his femoral pulse. He knew that this was a sign of an obstructed bypass graft and reported to the FCI clinic for treatment. The examining physician's

assistant diagnosed a possible arterial occlusion and referred the plaintiff to defendant Dr. Paul Pichardo for further evaluation and treatment. The physician's assistant assured the plaintiff that although the prison hospital facilities were not adequate for the type of surgery that might be required to remove an occlusion, the plaintiff could be transported to the Albert B. Chandler Medical Center at the University of Kentucky, a very few miles distant.

The plaintiff explained his medical history to Dr. Pichardo and expressed the fears of serious complications, including the loss of his remaining leg, if immediate treatment was not given. On June 2, Dr. Pichardo also received a number of frantic long distance telephone calls from worried family members and attorneys in Florida requesting immediate consultation with a vascular specialist. Dr. Pichardo failed to acknowledge an emergency, declined to send the plaintiff to the U.K. Medical Center in Lexington, Kentucky, and instead ordered bed rest and elevation of the right leg in an effort to reduce swelling.

During the night of June 2, the plaintiff experienced severe pain in his leg and was unable to move his toes. The nurse called Dr. Pichardo at home and informed him of the plaintiff's condition. Dr. Pichardo prescribed a mild sedative.

By the morning of June 3, the plaintiff's leg was cold, swollen and cyanotic. Dr. Pichardo arranged an examination at the U.K. Medical Center's vascular

clinic, and the plaintiff was admitted to the U.K. Medical Center at 11:20 a.m. After an angiogram revealed the location of the occlusion in the bypass graft, a balloon catheter was used to remove the obstruction. Although this surgical procedure was successful, it came too late to restore full circulation. The plaintiff's right leg was amputated above the knee on June 5, 1983.

Before trial, ordinary negligence was stipulated by the parties, in that the delay of proper treatment was the proximate cause of the amputation. It was further stipulated that plaintiff can no longer ambulate.

II. FINDINGS OF FACT

1. The Court finds that the plaintiff has incurred, and will continue to incur, expenses relating to his medical and personal needs[1] as a direct result of the United States's negligence. The testimony of Dr. Paul Nichols, an orthopedic surgeon familiar with the needs of amputees, established that a patient with plaintiff's medical history has a life expectancy of ten to fifteen years. The plaintiff has a good chance of medical stability for the first part of this period. In seven to ten years, however, he will begin to experience complications that will necessitate 10 to 14 hospital stays, including

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[1]These personal needs were described in the evidence as being wheelchairs, vans with hydraulic lifts, renovations to his residence, attendants, etc.

additional surgery, at an estimated cost of $6,200 to $10,000 for each stay.

Dr. Nichols also testified that the plaintiff will incur other expenses that naturally flow from being severely handicapped, including $2,000 for a wheelchair, $14,500 for a van and $8,500 for modifications to the van that would allow its operation by a handicapped driver. Each of these items has an expected useful life of about 5 years, requiring replacement at least once and possibly twice over the plaintiff's expected lifespan.

Although the purchase and use of these items will increase the plaintiff's mobility, some attendant care will still be required, particularly in the last years of the plaintiff's life. The opinion of Dr. Nichols was that an attendant will continue to be required for one or two hours per day for the next 5 to 7 years with an increasing need for attendant care thereafter. The plaintiff is currently paying $250 per week for an attendant working 12 hours per day, 5 days per week.

Donald Rochester, an architect, testified that certain modifications to the plaintiff's home will be required to accommodate the plaintiff's handicap. A number of doorways and halls, currently too narrow to accommodate passage of a wheelchair, will have to be widened. The bathroom and kitchen will have to undergo extensive remodeling to facilitate their use by a handicapped individual. Landings and ramps must also be installed.

Although the Court finds these modifications to be necessary, it finds Mr. Rochester's $60,000 cost estimate for the modifications and for $20,000 to restore the property, to be barely credible. Mr. Rochester was unable on cross examination to provide a convincing explanation of these estimated construction costs.

The findings in regard to the foregoing items of special damage must be tempered by the finding that the plaintiff would have incurred many, if not all, of these expenses at some time in the future regardless of the defendants' negligence. Dr. Nichols, the plaintiff's own medical expert, testified that the natural progression of the plaintiff's underlying cardiovascular disease *would have eventually required the amputation of the right leg.* Precisely *when* this would be required could not be presently predicted, since the doctor opined that the plaintiff had already "beaten the medical statistics."

When the Court compares the history of the graft and the first amputation to the onset of symptoms on June 2, 1983, pointing to the occlusion of the graft, it would seem that the probabilities were that the second amputation was about to happen sooner rather than later and finds the sum of $125,000, to fairly compensate him for his various items of special damage.

2. The Court further finds that the plaintiff has suffered extreme physical pain and mental anguish as a result of the defendants' negligence. The plaintiff had been trained to take the pulse in his leg, and on June

2, 1983, he understood the significance of a dminished pulse. Having lost his left leg to the ravages of the disease, he quite rightly feared the result of inadequate medical attention. The evidence also supports a finding of physical and mental pain and anguish, including the pain brought about by the required surgery and continuing pain in the future brought about by the resultant diminished blood flow in the plaintiff's stump. Hospital records introduced into evidence by both the plaintiff and the defendants clearly reflect that the plaintiff suffered considerable pain as a result of the delay in receiving proper medical treatment, and the Court finds that in this regard, the plaintiff has been damaged in the sum of $100,000.

3. The Court finds that the plaintiff is totally and permanently disabled and cannot return to his former occupation. Although the plaintiff introduced a letter containing an offer of employment at about the time he was to enter Federal custody and estimated that he could have earned as much as $50,000 per year, employment records revealed the following earned incomes:

CALENDAR YEAR	EARNINGS
1978	$20,700
1979	$23,850
1980	$25,750
1981	$24,075

The Court finds that the plaintiff would have earned $400,000, but for the negligence of the defendants.

4. Warden Elsea also received long distance telephone calls from plaintiff's family on the morning of June 2, 1983, putting him on notice that Serra was in the prison hospital with a dangerous medical problem and was not getting proper treatment.

5. The Warden did not ignore those calls. He conferred with Dr. Pichardo—advised that no emergency existed and that the staff would be capable of dealing with the problem. There were more than three such consultations with the staff.

6. During the night of June 2-3, 1983, when Serra became acutely distressed, the duty nurse telephoned the doctor for orders. It was not contended that the Warden was so advised.

7. On the morning of June 3, 1983, and when Dr. Pichardo first recognized an emergency to exist and arrangements were made to move Serra to U.K. Hospital, the Warden signed the papers, prepared by his staff, for Serra's removal from the prison. In this regard, Dr. Pichardo's testimony completely exonerated the Warden of any indifference or inaction.

8. A *Bivens* claim against an individual cannot be invoked *vicariously*. What Dr. Pichardo knew, or should have known; and Dr. Pichardo's failure to act in a timely manner — cannot be *imputed* to Warden Elsea.

III. CONCLUSIONS OF LAW

1. The terms of the Federal Tort Claims Act require that compensatory damages be measured

according to the law of the state where the events causing the damage occurred. 28 U.S.C. §2674. Under Kentucky law, the plaintiff should be awarded such sums of money as would fairly compensate him for his damages. *See e.g.* Palmore, *Kentucky Instructions to Juries*, §16.31. The jury advised an award for a total sum of $125,000, as reasonable compensation for his medical, surgical, attendant care and other personal needs. This Court concludes that this sum is adequate to meet those needs caused by the negligence of the defendants.

2. Kentucky law allows the recovery of damages for emotional (mental) suffering when that suffering is related to a physical injury. *Hetrick* v. *Willis*, 439 S.W.2d 942 (Ky. 1969). The emotional trauma found in this case is clearly related to the loss of the plaintiff's right leg. The plaintiff, having lost one leg to his disease, knew and fully appreciated the consequences of a delay in obtaining medical treatment. He must also live with the knowledge that the amputation of his right leg on June 5, 1983 would not have occurred but for the negligence of the defendants.

The common practice in the Commonwealth of Kentucky is for the jury to award damages for physical pain and mental disturbance or suffering as one lump sum. *City of Paducah* v. *Brunnhoper*, 135 S.W.2d 413 (Ky. 1939) *and see* Palmore, *Kentucky Instructions to Juries*, §16.31. The jury's combined award of $100,000 for physical and mental pain and suffering is fully supported by the evidence and the Court concludes that the

plaintiff was damaged in the amount of $100,000, for mental and physical pain and suffering, past and future.

3. The jury further advised an award of $400,000 for plaintiff's lost ability to earn money. Based on the findings that the plaintiff could have earned at least $25,750 per year (and $50,000 annually on the topside) but for the negligence of the defendants, the Court concludes that the sum of $400,000, will reasonably compensate him.

4. The Court concludes that there was insufficient evidence to suggest that defendant Elsea was aware of, and wilfully ignored or was indifferent to, plaintiff's medical needs that would entitle him to any award for punitive damages from the Warden. *Bivens*, supra.

A judgment in conformity with these findings and conclusions and with the verdict of the jury returned on November 9, 1984, shall be entered this day.

This 12th day of December, 1984.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR., Judge

* * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

JOSE SERRA — PLAINTIFF

V. **COMPLAINT** NO. _____

UNITED STATES OF AMERICA;
PAUL A. PICHARDO AND
ROBERT ELSEA — DEFENDANTS

****

Comes now the plaintiff, by counsel, and for his complaint herein states as follows:

INTRODUCTION

1. This is an action brought for the assertion of two separate but related claims for relief.

2. The First Claim for Relief is against the United States pursuant to the provisions of 28 U.S.C. §2671, *et seq.*, for personal injury caused by the negligent and wrongful acts and omissions of employees of the Government while acting within the scope of their office and employment.

3. The Second Claim for Relief is a direct action against Paul A. Pichardo and Robert Elsea, individually, for intentional violations of the plaintiff's constitutional rights, including his right, as guaranteed by the Eighth Amendment to the Constitution, of the United States to be free from cruel and unusual punishment.

PARTIES

4. The plaintiff, Jose Serra, is a citizen of the United States, whose residence is in Coconut Grove, Florida, and who at the time of all acts and omissions of which complaint is made herein was a federal prisoner, committed to the custody of the Attorney General of the United States by virtue of a judgment of the United States District Court for the Southern District of Florida.

5. The United States of America has assumed liability pursuant to 28 U.S.C. §2674, except for interest prior to judgment and for punitive damages, for those acts and omissions of which more particular complaint is made in the First Claim for Relief as alleged hereinbelow.

6. The defendant, Paul A. Pichardo, is, and was at the time of all acts and omissions of which complaint is made herein employed by the Government as a staff physician of the Federal Bureau of Prisons, at the Federal Correctional Institution at Lexington, Kentucky.

7. The defendant, Robert Elsea, is, and was at the time of all acts and omissions of which complaint is made herein, employed by the Government as a warden for the Federal Bureau of Prisons at the Federal Correctional Institution at Lexington, Kentucky.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the First Claim for Relief as alleged hereinbelow, by virtue of the provisions of 28 U.S.C. §1346(b).

9. All acts and omissions of which complaint is made herein occurred in Lexington, in the Eastern District of Kentucky, and venue of the First Claim for Relief lies in this Court pursuant to the provisions of 28 U.S.C. §1402(b).

10. On or about July 15, 1983, the plaintiff presented the claim which is the subject of the First Claim for Relief to the Federal Bureau of Prisons, the appropriate federal agency, and presentation of that claim was acknowledged by the Federal Bureau of Prisons on July 22, 1983. A copy of the claim and a copy of the letter from the Federal Bureau of Prisons acknowledging presentation of said claim are attached hereto, marked as Exhibits "A" and "B", respectively, and are incorporated herein by reference. Said agency failed to make any disposition of the aforesaid claim within six (6) months after it was filed, and the plaintiff has complied with all of the prerequisites set out in 28 U.S.C. §2675(a) to the institution of the First Claim for Relief.

11. This Court has original jurisdiction of the second claim for relief, as a civil action arising under the Constitution of the United States, pursuant to 28 U.S.C. §1331.

The defendants, Paul A. Pichardo and Robert Elsea, and each of them reside in the Eastern Judicial

District of Kentucky; the second claim for relief arose within the Eastern Judicial District of Kentucky and venue of the second claim for relief lies in this Court pursuant to the provisions of 28 U.S.C. §1391(b).

FIRST CLAIM FOR RELIEF

13. The plaintiff has a long history of atherosclerotic cardiovascular disease. Since 1971 he has undergone a series of artery bypass surgical procedures to improve the flow of blood to his lower extremities. On July 7, 1975, he reuired an amputation of the left leg above the knee. From 1975 until October 5, 1982, through a program of regular medical treatment, which included sustained maintenance dosages of a medication called persantine, the plaintiff's condition was maintained in a stable manner, and during that period of time, and continuing until June 2, 1983, the plaintiff was able to ambulate through the use of a left above the knee prosthesis. During the aforesaid period of time, and until June 2, 1983, the primary flow of blood to the plaintiff's lower extremities was maintained through a bifurcated bypass graft, which connected his abdominal aorta to his left and right common femoral arteries. At all times relevant to this complaint, the United States and its agents and employees, including Paul A. Pichardo were fully aware of all of the following.

14. From October 5, 1982, until June 3, 1983, the plaintiff was confined by the Attorney General of the United States in the Federal Correctional Institution at Lexington, Kentucky.

15. During the time period aforesaid, Robert Elsea was the agent and employee of the United States having responsibility for the care, maintenance and well-being of the plaintiff.

16. During the time period aforesaid, Paul A. Pichardo was the agent and employee of the United States having direct and immediate responsibility for providing medical care and treatment to the plaintiff.

17. During the time period aforesaid, from October 5, 1982, until June 3, 1983, in spite of repeated requests by the plaintiff therefor, the United States, acting through its agents and employees, failed to provide, except for a single one month supply of persantine, any significant treatment whatsoever for the plaintiff's vascular disease.

18. At approximately 7:00 a.m. on June 2, 1983, the plaintiff became aware that he was suffering from an occlusion of his arterial bypass graft and that his femoral artery pulses were substantially diminished. At approximately 8:00 a.m. on June 2, 1983, the plaintiff was seen at the medical clinic of the Federal Correctional Institution at Lexington, Kentucky, by a physician's assistant, one Stephen Gipe, who confirmed the plaintiff's conclusions and who confirmed to the plaintiff that he should be immediately removed from the Federal Correctional Institution to a medical facility having the capacity to surgically correct the occlusion of the plaintiff's bypass graft.

19. At approximately 10:00 a.m. on June 2, 1983, the plaintiff was admitted "for observation" to the hospital facility at the Federal Correctional Institution, and was kept in that facility for approximately 24 hours, or until approximately 10:00 a.m. on June 3, 1983.

20. During the day of June 2, 1983, the plaintiff repeatedly requested to agents and employees of the United States, including Paul A. Pichardo, that he be immediately removed to a medical institution having the capacity to adequately treat, including by surgical intervention, the occlusion of his graft. During the day of June 2, 1983, agents and employees of the United States, including Paul A. Pichardo and Robert Elsea, were repeatedly warned, by attorneys, physicians, and members of the plaintiff's immediately family, that the plaintiff's condition presented a medical emergency, that immediate medical intervention was needed, and that delay in medical treatment would cause the plaintiff to lose his last remaining leg.

20. During the period from 8:00 a.m. on June 2, 1983, until 10:30 a.m. on June 3, 1983, the United States, through its agents and employees, and in spite of the knowledge and warnings alleged previously herein, failed and refused to provide any medical treatment whatsoever, for the occlusion of the plaintiff's bypass graft, and Paul A. Pichardo issued, in his capacity as an agent and employee of the United States, medical orders directing that the plaintiff's right leg be kept elevated.

21. As the said Paul A. Pichardo then and there well knew, the effect of his medical order was not to treat or aid the plaintiff's medical condition but, rather, to further reduce the arterial blood flow in the plaintiff's right leg and to thereby exacerbate the effect of the occlusion of the plaintiff's arterial bypass graft.

22. On June 3, 1983, at approximately 11:00 a.m., the plaintiff was finally transferred to the University of Kentucky Medical Center, where, by surgical intervention, physicians were able to successfully restore the flow of arterial blood to the plaintiff's right leg.

23. As a direct and proximate result of the acts and omissions of which complaint is made herein, including the unwarranted delay of the United States, its agents and employees in providing the plaintiff with surgical intervention for the occlusion of his arterial bypass graft and in ordering, during the period of such delay, that his right leg be elevated, the tissues of the plaintiff's lower right leg were irreversibly damaged and, on June 5, 1983, the amputation of the plaintiff's right leg, below the knee, was required.

24. As a direct and proximate result of the acts and omissions of the United States, its agents and employees, as more particularly alleged hereinabove, the physicians at the University of Kentucky Medical Center were required, on June 3, 1983, to perform their surgery in an emergency fashion, and to direct their attention solely to the restoration of arterial blood flow to the plaintiff's right leg. As a direct consequence of

this series of events, said physicians were unable to attempt to restore arterial blood flow to the plaintiff's left stump, and the plaintiff now has permanently impaired arterial blood flow to his left stump.

25. As a direct and proximate result of the acts and omissions of which complaint is made hereinabove, the plaintiff is now unable to significantly ambulate by the use of prostheses, and the plaintiff is now and will be, for the rest of his life, confined to a wheelchair and is now permanently and totally disabled.

26. Immediately prior to the acts and omissions of which complaint is made herein, the plaintiff was an able bodied man, 52 years of age, and fully capable of earning income for the support of himself and his family.

27. As a direct and proximate result of the acts and omissions of which complaint is made herein, the plaintiff's present and future capacity to earn income has been totally destroyed, and he has been thereby damaged in the amount of $2,000,000.

28. As a direct and proximate result of the acts and omissions of which complaint is made herein the plaintiff requires, and will for the rest of life continue to require, the assistance of employees in meeting his daily personal needs, which he could, prior to the acts and omissions of which complaint is made herein, meet himself, and the plaintiff has been thereby damaged in the amount of $500,000.

29. As a direct and proximate result of the acts and omissions of which complaint is made herein, the plaintiff has incurred and care will continue to incur for the rest of his life, expenses for medical and treatment and has been thereby damaged in the amount of $500,000.

30. As a direct and proximate result of the acts and omissions of which complaint is made herein the plaintiff has endured and will continue to endure extreme and excruciating physical pain and suffering and has been thereby damaged in the amount of $10,000,000.

31. As a direct and proximate result of the acts and omissions of which complaint is made herein the plaintiff has endured, and will continue to endure extreme mental anguish in suffering, and has been thereby damaged in the amount of $7,000,000.

SECOND CLAIM FOR RELIEF

32. The plaintiff realleges, reaffirms and reiterates each and every preceding allegation of this complaint, as if set out at length herein.

33. The plaintiff, has, and had at all times relevant to this complaint, the right, as guaranteed by the Eighth Amendment to the Constitution of the United States, to be free from cruel and unusual punishment.

34. The defendant, Paul A. Pichardo, at the time of the acts and omissions of which complaint is made

herein, including, but not limited to, issuing medical orders requiring the elevation of the plaintiff's right leg at a time when the flow of arterial blood to that leg was already seriously impaired and in refusing and failing to treat serious medical conditions of the plaintiff of which the said Paul A. Pichardo was then and there fully aware, acted with deliberate indifference to the plaintiff's serious medical needs and acted with the willful, intentional and malicious purpose of denying the plaintiff his constitutional rights, including his right to be free from cruel and unusual punishment.

35. At the time of the acts and omissions of Robert Elsea, as more particularly alleged herein, including, but not limited to, the failure and refusal of the said Robert Elsea to cause the timely removal of the plaintiff from the Federal Correctional Institution at Lexington, Kentucky, to a hospital facility at which he could be surgically treated for the occlusion of his arterial bypass graft, as more particularly alleged herein, and at a time when the said Robert Elsea had been particularly warned by attorneys, physicians, and immediate members of the plaintiff's family, that the plaintiff's condition presented a medical emergency and that delay in treatment would cause the loss of the plaintiff's last leg, the said Robert Elsea acted with deliberate indifference to the plaintiff's serious medical needs and acted with the willful, intentional and malicious purpose of the denying the plaintiff his constitutional rights, including the right to be free from cruel and unusual punishment.

PRAYER

WHEREFORE, the plaintiff respectfully prays as follows:

1. That he recover compensatory damages from the United States in the amount of $20,000,000, together with interest from the date of judgment until paid, in satisfaction of his First Claim for Relief.

2. That he recover punitive damages in the amount of $5,000,000 from the defendant, Paul A. Pichardo, and additional punitive damages in the amount of $5,000,000 from the defendant, Robert Elsea, in satisfaction of his Second Claim for Relief.

3. That he have a trial by jury of all issues of fact raised by his Second Claim for Relief.

4. That he be granted such further, additional and complete relief as to which he may be entitled in the premises.

BULLEIT, KINKEAD, IRVIN & REINHARDT
/s/ David R. Irvin
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* * * * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO.: 84-28

JOSE SERRA, PLAINTIFF

VS. **STIPULATIONS**

UNITED STATES OF AMERICA,
ET AL., DEFENDANTS

* * * * * * * *

The United States of America and Jose Serra do hereby stipulate, concerning the issues between them in this action, as follows:

1. That Plaintiff, Jose Serra, became a federal prisoner on November 25, 1981, and was later convicted of a crime punishable by imprisonment for more than one year. Jose Serra was sentenced to three years and he remained a federal prisoner until January 22, 1984, which was his mandatory release date.

2. The defendant, United States of America, has admitted liability for the injuries sustained by Jose Serra as a result of the failure of its officers and employees to timely provide him medical care and treatment while he was incarcerated in the Federal Correctional Institution in Lexington, Kentucky on June 2 and 3, 1983.

3. The injuries sustained by Jose Serra include the amputation of his right leg below the knee and the

permanent impairment of the arterial blood supply in his left stump.

4. As a result of the injuries mentioned in Stipulation Nos. 2 and 3, Jose Serra is unable to effectively use prosthetic devices in order to ambulate.

5. Jose Serra was 52 on June 2, 1983, and is currently 53 years of age.

6. The actuarial life expectancy of a 53-year-old male is 22.91 years.

/s/ David R. Irvin
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* * * * * * *

Supreme Court, U.S.
FILED
JUL 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2101

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSE SERRA, PETITIONER

v.

PAUL A. PICHARDO AND ROBERT ELSEA, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
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2 L. Jayson, *Handling Federal Tort Claims* (1986) 3, 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that a district court judgment against the United States under the Federal Tort Claims Act barred a judgment against respondents on petitioner's *Bivens* claims (*Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)).

1. a. Petitioner, formerly a federal prisoner, sued the United States and respondents Pichardo and Elsea, a prison doctor and the warden. In an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.,* petitioner alleged that the prison doctor's negligent handling of a medical emergency that arose during a 36-hour period beginning on the morning of June 2, 1983, caused an otherwise unnecessary amputation of his right leg. Petitioner also sued the prison doctor

and the warden, alleging that the conduct of each constituted deliberate indifference to his medical needs in violation of the Eighth Amendment. Pet. App. 1a-3a.

At trial, the United States stipulated to the negligence of its officers and employees, thus admitting liability under the FTCA and limiting the dispute on that claim to the amount of damages. The jury that was empaneled to try petitioner's *Bivens* claims against the respondents also served as an advisory jury on the FTCA claim. Based on the evidence, the district court directed a verdict in favor of the warden. The jury, however, returned an advisory verdict of $625,000 as compensatory damages against the United States and a verdict of $15,000 in punitive damages against the prison doctor (Pet. App. 3a). The district judge adopted the advisory verdict and entered judgment against the United States on the FTCA claim and against the prison doctor on the *Bivens* claim.

b. Respondent Pichardo appealed from the judgment against him on the ground, among others, that the judgment entered against the United States on petitioner's FTCA claim barred petitioner's *Bivens* action against the individual defendants.[1] The court of appeals agreed that, under the terms of the FTCA, the judgment against the United States on petitioner's negligence claim barred his *Bivens* action against respondents. 786 F.2d 237 (1986). Accordingly, the court of appeals affirmed the directed verdict in favor of respondent Elsea, reversed the judgment against respondent Pichardo, and remanded the case to the district court with instructions to enter judgment in favor of respondent Pichardo.

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[1]Initially, the United States appealed from the judgment against it, and petitioner cross-appealed, each challenging the amount of damages awarded. Both the United States' appeal and petitioner's cross-appeal were voluntarily dismissed.

2. The decision of the court of appeals is a straightforward application of 28 U.S.C. 2676, which provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Petitioner obtained a judgment against the United States in an action under Section 1346(b), and therefore he is barred from maintaining an action against respondents by reason of the same subject matter.[2]

Petitioner offers no construction of the statutory language, no legislative history, and no conflicting decision of another court of appeals to support his contrary argument. Instead, he relies on *Carlson* v. *Green,* 446 U.S. 14 (1980). In *Carlson,* the plaintiff had not brought an action against the United States, but had brought a *Bivens* action against individual federal employees only. The Court held that the mere availability of an FTCA action did not preclude the *Bivens* claim because there was "no explicit congressional declaration" that the availability of an FTCA claim precluded a *Bivens* claim (446 U.S. at 19). By contrast, Section 2676 is an explicit congressional declaration that pursuing an FTCA claim to judgment does preclude any other action by reason of the same subject matter against the federal employee whose act or omission gave rise to the claim.

Petitioner could have forgone or postponed his FTCA action against the United States and brought himself squarely within the rule of *Carlson.* By pursuing his FTCA

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[2]The court of appeals explicitly held (Pet. App. 4a-8a) that petitioner's action against respondents is by reason of the same subject matter as his judgment against the United States, and petitioner offers no basis to question that holding.

claim to a judgment of $625,000, however, petitioner brought himself within the rule of Section 2676 barring contemporaneous or subsequent recovery against respondents. See 2 L. Jayson, *Handling Federal Tort Claims* § 310, at 16-81 (1986) ("If the government employee and the United States are sued in the same suit, entry of judgment against the United States clearly bars entry of a judgment against the employee.").

The court of appeals took note of *Carlson* and correctly distinguished it (786 F.2d at 241 (footnote omitted)):

> In *Carlson,* the Court held that a *Bivens* remedy is available to a plaintiff even though a plaintiff's allegations also could have supported a suit against the United States under the FTCA. But the instant case, unlike *Carlson,* deals with the effect of a FTCA judgment on a plaintiff's power to continue to pursue a *Bivens* remedy. As noted above, the scope of that power is defined and limited by a section of the FTCA that the Court in *Carlson* had no occasion to address.

Thus, although this Court in *Carlson* may have suggested that a claim brought against the United States under the FTCA and a *Bivens* claim brought against a government employee in his individual capacity might be complementary causes of action, nothing in *Carlson* contradicts the court of appeals' reading of the plain language of Section 2676: that a *judgment* against the United States under the FTCA bars further pursuit of a complementary *action* against a federal employee.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

DOJ-1986-07